U.S. Department of Labor

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Issue Date: 19 October 2005

CASE NO.: 2004-LHC-2768

OWCP NO.: 07-169502

IN THE MATTER OF

ROMELL WASHINGTON

Claimant

v.

NATIONAL TECHNOLOGIES, INC.

Employer

and

ZURICH AMERICAN INSURANCE CO.

Carrier

APPEARANCES:

Gerald C. deLaunay, ESQ.

For The Claimant

Frank J. Towers, ESQ.

For The Employer/Carrier

Before: LEE J. ROMERO, JR.
Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, et seq., (herein the Act), brought by Romell Washington (Claimant)

against National Technologies, Inc. (Employer) and Zurich American Insurance Co. (Carrier).

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. Pursuant thereto, Notice of Hearing was issued scheduling a formal hearing on April 13, 2005, in Metairie, Louisiana. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. Claimant offered 16 exhibits, Employer/Carrier proffered 13 exhibits which were admitted into evidence along with one Joint Exhibit.[1] Claimant offered eight post-hearing exhibits, of which exhibit Nos. 11 through 17 were admitted into the record. Claimant's Exhibit No. 10 was rejected. This decision is based upon a full consideration of the entire record.[2]

Post-hearing briefs were received from the Claimant and the Employer/Carrier. Based upon the stipulations of Counsel, the evidence introduced, my observations of the demeanor of the witnesses, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

I. STIPULATIONS

At the commencement of the hearing, the parties stipulated (JX-1), and I find:

1. That the Claimant was injured on February 10, 2004.

2. That Claimant's injury occurred during the course and scope of his employment with Employer.

3. That there existed an employee-employer relationship at the time of the accident/injury.

4. That the Employer was notified of the accident/injury on February 10, 2004.

5. That Employer/Carrier filed Notices of Controversion on June 7, 2004 and July 27, 2004.

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[1] Employer offered Exhibits 1-3 and 6-15.

[2] References to the transcript and exhibits are as follows: Transcript: Tr.___ ; Claimant's Exhibits: CX-___; Employer/Carrier Exhibits: EX-___; and Joint Exhibit: JX-___.

6. That an informal conference before the District Director was held on July 14, 2004.

7. That Claimant received temporary total disability benefits from February 18, 2004 through May 21, 2004, at a compensation rate of $257.58.

8. That all authorized medical benefits for Claimant have been paid.

II. ISSUES

The unresolved issues presented by the parties are:

1. The nature and extent of Claimant's disability.

2. Whether Claimant has reached maximum medical improvement.

3. Claimant's average weekly wage.

6. Entitlement to and authorization for on-going medical care and services.

7. Attorney's fees, penalties and interest.

III. STATEMENT OF THE CASE

The Testimonial Evidence

Claimant

Claimant was 41 years old at the time of formal hearing. A recorded statement of Claimant was taken on March 3, 2004, and he was deposed by the parties on March 4, 2005. (EX-6; EX-10). He graduated from high school and attended one or two semesters of college at Nicholls State University. He has consistently worked as a welder since the 1980s. (Tr. 81). Claimant did not recall the exact date on which he applied for employment with Employer, but did not dispute an application date of August 19, 2002, as indicated in Employer's records. (Tr. 82).

At his deposition, Claimant stated he was paid $19.00 per hour when hired by Employer. (EX-6, p. 32). He testified he was not told that his hourly wages would be broken into more than one element and noticed a $10.00 per diem on his first paycheck. He questioned Mr. Arthur Smith about the per diem and

was told "that's the way they paid."[3] (Tr. 67-68). The $10.00 per diem was not taxed by the government.[4] (Tr. 83). He denied negotiating his salary in an attempt to receive a higher per diem rate; he also testified that he did not request a higher per diem in order to have less money go towards child support payments. (Tr. 84, 86).

Claimant testified that he was never required to spend the night on the road and normally worked 40 to 48 hours a week from Monday through Friday and on "a lot" of Saturdays. (Tr. 68). He commuted daily to Avondale from his home in Raceland, Louisiana. (Tr. 89).

In his recorded statement, Claimant stated that he felt a pain in the lower left side of his back while "turning" a tank at work on February 10, 2004.[5] (EX-10, p. 5). Claimant reported his accident to Al Folse, his supervisor, who sent him to First Aid.[6] (Tr. 68). After Claimant was examined, he met with Stephanie Judice and asked to see a doctor. Ms. Judice instructed him to sign a "Free Choice of Physician" form in order to see a doctor and informed him that he could see the doctor of his choice.[7] (Tr. 69; EX-6, p. 75). Ms. Judice gave him directions to Dr. Gallagher's office, but he had no prior relationship with Dr. Gallagher. (Tr. 70). At his deposition, he testified that he "wanted to see a doctor." (EX-6, p. 75). He further testified that Ms. Judice did not explain that the form was for him to see Dr. Gallagher "exclusively" and that he would not have signed the form if he had such information.[8] (EX-6, p. 94).

Claimant also testified that Dr. Gallagher did not inform him of any "findings." (Tr. 70). He returned to work for two or three days, but could not do anything and was told there was no light duty work. (Tr. 71, 78). He returned to Dr. Gallagher

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[3] Claimant testified that no one ever explained the $21.00 overtime rate. (Tr. 68).

[4] At his deposition, Claimant stated that he did not discuss the per diem with any of his supervisors because he previously had worked per diem jobs. (EX-6, pp. 33-34). He further testified that he noticed the per diem was not taxed by the government, which he discussed with Mr. Smith. (EX-6, p. 35).

[5] He pulled a muscle in his upper back in 1996 and underwent treatment at Lakeside Hospital. (EX-10, p. 5).

[6] Mr. Folse was employed by Avondale, rather than by Employer. Mr. Folse told Claimant "what to do or what not to do" at work and informed Claimant that light duty work was not available. (Tr. 89-90).

[7] Claimant identified his signature on a "Free Choice of Physician" form.

[8] Claimant would have preferred to treat with a physician recommended by his attorney. (EX-6, p. 95).

and underwent an MRI. Subsequently, Ms. Judice telephoned Claimant and instructed him not to return to work. Claimant began receiving workers' compensation payments. (Tr. 71). Dr. Gallagher recommended physical therapy and Claimant continued treating with him. (Tr. 71-72). The physical therapy he received at "LaTerre Therapy" aggravated his back; he returned to Dr. Gallagher and was instructed to discontinue physical therapy. (Tr. 72).

Claimant testified that no one, including Dr. Gallagher or Ms. Judice, informed him that he could return to work, including light duty work.[9] He was not offered a light duty position with Employer, nor was he offered any other employment with Employer. (Tr. 72-73, 75). He further testified that no one explained why his compensation benefits were terminated. (Tr. 75).

Claimant testified that Dr. Gallagher wanted him to receive a second opinion, which had to be approved by Ms. Judice. (Tr. 73, 92). He estimated that his last visit with Dr. Gallagher occurred two months before formal hearing and before his appointment with Dr. Moss. (Tr. 74). He saw Dr. Moss after his workers' compensation benefits were terminated. (Tr. 73).

Claimant was never scheduled for a Functional Capacity Evaluation. Employer did not authorize treatment with any doctors after Dr. Moss. (Tr. 76). Claimant was never told that he could not return to Dr. Gallagher.[10] (Tr. 90).

Claimant sought treatment with Dr. Kinnard because he was not receiving any medical treatment. (Tr. 76). He later sought treatment with Dr. Robison at "Leonard Chabert" because he did

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[9] At his deposition, Claimant stated that Dr. Gallagher "told me that he wanted me to go back to work. I told him I would like to go back to work, but I'm still hurting too bad. I can't go back to work like that." (EX-6, p. 84). In response to his deposition testimony at formal hearing, Claimant stated he testified that "[Dr. Gallagher] asked me was I able to go back to work and I told him 'No.'" (Tr. 80).

[10] Claimant testified that he was instructed to call Ms. Judice to confirm an appointment with Dr. Gallagher's office, but received "the runaround" from Ms. Judice and the doctor's office. Claimant further testified that Ms. Judice would not take phone calls from his former attorney. He did not know if the attorney attempted to correspond with Ms. Judice regarding treatment with Dr. Gallagher. (Tr. 91). Ms. Judice testified that she did not receive a phone call from Harold Lamy, Claimant's former attorney, regarding treatment with Dr. Gallagher. She informed one attorney that he needed to provide power of attorney documentation, but did not receive any additional information. (Tr. 95). Although Ms. Judice received correspondence from attorneys regarding representation of Claimant, she did not receive any requests that Claimant return to Dr. Gallagher. (Tr. 96).

not have any money and needed medical attention. (Tr. 76). At the time of formal hearing, Claimant was on a waiting list for physical therapy, pursuant to Dr. Robison's recommendation. (Tr. 77; EX-6, p. 83).

Claimant testified he was still in pain at the time of formal hearing and could not do "welder's work." He cannot bend over, stoop down, or keep his arms outstretched for long periods of time. (Tr. 77). He also experiences sharp pain in his legs when he sits or stands for long time periods. The pain described by Claimant began at the time of his accident and prevented him from performing his job as of the time of hearing. (Tr. 78-79).

Claimant has not worked or looked for employment since February 10, 2004, because he is not "physically" able to do it. (Tr. 87; EX-6, p. 86). He attempted to return to work with Employer for "three days or so" and was allowed to "sit around and basically not do nothing" because no light duty work was available. (Tr. 78). He testified that Dr. Gallagher did not tell him to return to regular duty work. (Tr. 87). In 2003, the Louisiana Department of Labor determined that Claimant fraudulently received unemployment insurance while he was employed. (Tr. 87-88; EX-9, p. 3). He was not collecting unemployment at the time of formal hearing. (Tr. 88).

At his deposition, Claimant stated that his lower back is "a little better" and that the pain "goes and comes." (EX-6, p. 88). He cannot sleep well at night because of his lower back and he does not usually leave the house because his back is aggravated by long car rides, too much walking, and bending.[11] (EX-6, p. 91).

Arthur Smith

Mr. Smith, who testified at formal hearing, has been employed by Employer as the "coordinator" for approximately two and one-half years. He served as Employer's Vice-President beginning in 2001. (Tr. 36-37, 96). He appeared as the corporate representative at the deposition of Employer taken in connection with the instant case. (Tr. 37).

Employer is a contract labor firm that provides labor for several companies, including Northrop Grumman Ship

[11] Employer submitted surveillance reports dated September 22, 2004, September 28, 2004, and September 29, 2004. According to the reports, no activity by Claimant was observed. (EX-12).

Systems/Avondale Shipyard. All of Employer's employees at Northrop Grumman Ship Systems/Avondale Shipyard earn a per diem and no taxes are withheld on the per diem portion of employees' pay.[12] (Tr. 97-98). Mr. Smith testified that the per diem defrayed employees' expenses such as lodging and travel expenses. He also testified that Employer "didn't have any particular thing that [it was] defraying. It was the way everybody was paid along that stretch of contract at Northrop Grumman." (Tr. 104). Employer paid a per diem on an hourly basis, rather than on a basis of expenses incurred. (Tr. 105).

Prior to hiring Claimant, Employer advertised that employees could "earn up to" $19.00 an hour. (Tr. 37). Mr. Smith testified that Claimant "negotiated" his per diem rate prior to being hired, requesting "7 and 12" to avoid "paying all that child support money." (Tr. 98-99).

When Claimant was hired, Employer agreed to pay him $19.00 per hour for the first forty hours worked, whether or not he incurred expenses "on the road." (Tr. 39). Claimant earned an overtime rate of $21.00 per hour.[13] (Tr. 42).

Employer issued paychecks to Claimant that broke the $19.00 figure into a $9.00 hourly rate and an additional $10.00 per hour identified as "P/D lodging." (Tr. 39). Every hourly employee received the "P/D lodging" component. (Tr. 40). Claimant was never required to "spend a night away" after reporting to work and worked an average of 40 hours per week. (Tr. 42, 100). At the time he was hired, Claimant was informed that he would receive base pay and a per diem. Mr. Smith did not recall stating that the per diem was not taxable, but "assumed that was understood." (Tr. 99). Claimant was employed by Employer for over one year. (Tr. 100).

At his deposition, Mr. Smith produced documents that were representative of Claimant's wage records. Mr. Smith testified the payroll records reflected per diem payments that were not taxed by the government. (Tr. 102). At formal hearing, Claimant's counsel presented several check stubs that were omitted from the wage records provided by Employer. Mr. Smith could not explain why the information was omitted from the

[12] Employer did not pay "Social Security" on the money designated "as something other than wages on [Employer's] pay records" until it was instructed to do so following an audit. (Tr. 103).

[13] Prior to mid-2004, Employer required its employees to pay their own taxes on overtime earnings. (Tr. 65).

records presented at the deposition, but testified he produced all the records of which he was aware. (Tr. 44-53). He forgot to bring Claimant's earning records to formal hearing, but presumed those records would be the same as the records produced at the deposition. (Tr. 53).

Mr. Smith did not know whether Claimant's average weekly wage was calculated from the records produced at his deposition. He did not know whether the hourly $10.00 per diem was used in calculating Claimant's average weekly wage, nor did he know who calculated the average weekly wage. (Tr. 54).

Mr. Smith was Employer's representative in charge of administering Claimant's claim. (Tr. 54). Ms. Judice handles the workers' compensation claims for Carrier and she signed "Employer's First Report of Injury" on Employer's behalf. (Tr. 55-56). She identified Claimant's weekly earnings as $369.28, but Mr. Smith testified he did not know "where that exact number is coming from" and he did not know why Claimant's hourly wage was not included on the form. (Tr. 56-57). He further did not know whether the identified weekly earnings included the $10.00 per hour portion of Claimant's earnings. (Tr. 57).

Ms. Judice regularly handles Employer's workers' compensation claims and is authorized to sign Department of Labor forms and "anything pertaining to workers' comp" on Employer's behalf. (Tr. 57, 61). Mr. Smith does not review Ms. Judice's work to determine its accuracy. He testified that she has access to Employer's payroll records, which she can obtain by contacting his office. Mr. Smith "authorized" someone in his office to provide Claimant's payroll records to Ms. Judice. (Tr. 58-59).

Mr. Smith was aware Claimant began seeing a doctor, but did not know how Claimant began seeing the doctor or the name of Claimant's physician. (Tr. 60). Mr. Smith testified that light duty work is offered by Employer. He did not personally offer Claimant either light duty or regular duty work. (Tr. 63).

The Medical Evidence

Daniel Gallagher, M.D.

Dr. Gallagher, a board-certified orthopaedic surgeon, was deposed by the parties on March 4, 2005. (EX-7, p. 5). On February 10, 2004, Claimant presented with complaints of pain radiating into his posterior left leg, mostly in his buttock

area, and reported experiencing pain in his lower back at work while "lifting a pipe via fulcrum." (EX-2, p. 19; EX-7, pp. 7-9). Dr. Gallagher found "decreased forward flexion secondary to pain," "painful extension," and "full range of motion with extension of the lumbar spine." (EX-2, p. 19; EX-7, p. 10). Dr. Gallagher identified muscle spasms in Claimant's left lumbar and paraspinal muscles. Claimant's x-rays were normal and Dr. Gallagher diagnosed a "mild to moderate" lumbar strain, which he opined occurred due to the described work injury. (EX-7, pp. 11-12, 14). He placed Claimant on light duty work, which he described as no climbing ladders or scaffolds, no working at heights, no repetitive bending or lifting, and restricted lifting of less than 25 pounds. (EX-2, p. 21; EX-7, pp. 12, 14).

On February 18, 2004, Claimant returned with complaints of increased lower back pain radiating into his left leg and causing numbness in his left calf. He also complained of pain and numbness in his left thigh. Dr. Gallagher found a positive straight leg raise on the left side and noted Claimant had full strength and was neurologically intact. (EX-2, p. 22; EX-7, p. 16). He did not document any muscle spasms. (EX-7, p. 17). He recommended an MRI and instructed Claimant not to return to work until the MRI was performed and he was seen again. (EX-2, p. 22; EX-7, p. 18).

On March 5, 2004, Claimant complained of back pain without radiation into his lower extremities. (EX-7, p. 18). Dr. Gallagher noted signs of "symptom exaggeration." (EX-7, pp. 18-19). A range of motion test showed a "very limited" range of motion secondary to pain, but Dr. Gallagher found no objective reasons for such result. He affirmed a discrepancy existed between his objective findings and Claimant's subjective complaints. (EX-7, pp. 20-21).

Dr. Gallagher reviewed the results of an MRI dated February 23, 2004, which showed "mild arthritis in the lower lumbar facets and a very mild bulging disc" at "L3-4" "L4-5." (EX-7, pp. 21, 32; CX-2, 4). He opined Claimant's disc or facet joints were not injured at the time of the work-related accident and testified these findings are not unusual in an individual of Claimant's age who performed "labor work" his entire life. (EX-7, p. 22).

Dr. Gallagher testified that he discussed a return to light duty work, but Claimant was resistant to returning to work. (EX-7, p. 23). He did not feel Claimant was at maximum medical

improvement on March 5, 2004, and wanted Claimant to attend physical therapy. (EX-7, pp. 24-25).

On March 26, 2004, Claimant reported no improvement. Dr. Gallagher noted positive Waddell signs of symptom exaggeration. He recommended that Claimant return to regular work without restrictions and recommended a second opinion with another physician. (EX-2, p. 24; EX-7, pp. 25, 27). Although they discussed Claimant's return to work as a pipe welder, Dr. Gallagher did not believe Claimant wanted to return to work. Dr. Gallagher opined Claimant reached maximum medical improvement on March 26, 2004. (EX-7, p. 26).

On May 21, 2004, Claimant presented with no change in his complaints. Dr. Gallagher found decreased lumbar extension because of pain. A second opinion was scheduled for the following week.[14] (EX-7, p. 27). Dr. Gallagher opined there was no work-related abnormality on Claimant's MRI because the mild arthritis and mild bulging disc were degenerative conditions. He again found Claimant was positive for Waddell signs of symptom exaggeration. He maintained the opinion that Claimant could return to full duty work without restrictions. (EX-2, p. 25; EX-7, p. 28). Dr. Gallagher prescribed an anti-inflammatory medicine and a mild pain medication due to the presence of mild arthritis and Claimant's complaints of pain.[15]

On October 12, 2004, Dr. Gallagher reviewed the second opinion report of Dr. Lee Moss. (EX-2, p. 26). He agreed with Dr. Moss's findings and opinions of "no objective abnormalities" and "some inconsistencies that did not correlate with [Claimant's] subjective complaints." (EX-7, p. 29). He did not agree with Dr. Moss's recommendation of modified duty and again recommended Claimant return to regular duty work. (EX-7, pp. 30, 33). He did not feel a FCE was unreasonable, but he did not feel it was necessary. (EX-7, p. 34).

In Dr. Gallagher's opinion, Claimant required no further treatment for his lumbar spine strain, which had healed by May 21, 2004. He would treat Claimant's mild arthritis and the

[14] Dr. Gallagher did not know how Claimant obtained a return appointment before receiving a second opinion. He assumed the second opinion was delayed, so he saw Claimant one week before the second opinion physician. (EX-7, p. 42).

[15] Dr. Gallagher noted Claimant complained "of a great deal of pain more so then [sic] what his MRI or his exam or his x-rays would account for." (EX-7, p. 44).

"degeneration in his lumbar spine" symptomatically. (EX-7, p. 30).

Dr. Gallagher further testified that "neuroforaminal stenosis" was not the cause of Claimant's pain because "neuroforaminal stenosis causes a pinched nerve shooting down the leg not simply low back pain." (EX-7, pp. 31-32). He noted Claimant's initial complaints included pain into his buttocks, thigh, and calf, but also testified that Claimant later complained only of low back pain.[16] (EX-7, p. 32).

Dr. Gallagher could not medically determine when Claimant's bulging discs occurred, but did not believe Claimant had an asymptomatic condition that became symptomatic as a result of a trauma. (EX-7, pp. 33-35). Although Claimant's injury "could have" aggravated a pre-existing condition, Claimant's "arthritis and bulging disc are so mild it doesn't account for what he's reporting. They're so mild and his complaints are so drastic it's very inconsistent." (EX-7, p. 45). He could opine Claimant's symptoms were aggravated by the accident if he had "severe degenerative disc disease," "severe arthritis," or "severe foraminal stenosis." (EX-7, p. 46). Dr. Gallagher stated that Claimant's arthritis pre-existed the work accident because it could not have developed during the two weeks between the accident and Claimant's MRI. (EX-7, p. 51).

Dr. Gallagher disagreed with Dr. Kinnard's May 20, 2004 diagnosis of "lumbosacral strain with degenerative disc disease," to the extent that he felt Claimant's strain had healed by May 2004. (EX-7, p. 38).

La Terre Physical Therapy

On March 11, 2004, Claimant reported severe pain and burning. The physical therapy records assessed acute pain greater on Claimant's left than his right, altered stance, labored transitional movement, and "painful trunk." (CX-3, p. 6). Claimant attended physical therapy sessions on March 11, 2004; March 12, 2004; March 16, 2004; and March 19, 2004. Notes

[16] His report sent to insurance companies and employers dated May 21, 2004, identifies "buttocks pain" which could be consistent with irritation of the nerve. (EX-2, p. 32; EX-7, p. 36). A similar report dated February 10, 2004, fails to indicate "radiation of the pain," but Dr. Gallagher's office notes of that date, taken by his assistant, state Claimant's pain "radiated into the posterior lower left extremity, mostly in the buttocks." (EX-2, pp. 19, 29; EX-7, p. 37).

from each session identified complaints of pain in Claimant's left lower extremity or gluetal area. (CX-3, p. 8). On March 22, 2004 and March 24, 2004, the notes indicate Claimant experienced increased pain and increased lower back pain. On March 30, 2004, Claimant discontinued physical therapy. (CX-3, pp. 8-9).

J. Lee Moss, M.D.

Dr. Moss, whose credentials are absent from the record, examined Claimant on May 27, 2004, for a "second medical opinion" after referral by Dr. Gallagher. Claimant explained that he felt a "pulling in his low back" while attempting to "roll" a tank at work on February 10, 2004. Claimant presented with complaints of increased pain in his lower back and pain in "his left posterior thigh leg with tingling and numbness in his left foot while walking." Dr. Moss noted Claimant walked with a limp. Claimant had "very limited motion with pain" in his lumbar spine and complained of low back pain "upon testing both ankles, leg and hip muscles." (CX-4, p. 3).

Dr. Moss opined Claimant "sustained a lumbar strain which could have aggravated the pre-existing degenerative changes in his lumbar spine." He noted unspecified inconsistencies in Claimant's physical examination, which he felt did not correlate with Claimant's subjective complaints. Dr. Moss recommended modified duty with no bending or stooping and a 20-pound lifting restriction until a functional capacity evaluation was performed. (CX-4, p. 4).

Joseph Robison, M.D.

Dr. Robison was deposed by the parties on March 22, 2005. He is an orthopedic surgery resident in his fourth year of residency. (CX-7, p. 5). He examined Claimant at Leonard Chabert Medical Center on January 10, 2005, at which time he obtained a history and reviewed an MRI and "plain radiographs."[17] (CX-7, p. 6). Claimant experienced pain primarily in his lower back, but with occasional "radiation." (CX-5, p. 4; CX-7, p.

[17] Dr. Robison did not review records from Dr. Gallagher, Dr. Moss, Dr. Kinnard, or LaTerre Physical Therapy. (CX-7, p. 27). Additionally, the record contains medical reports from Leonard Chabert Medical Center dated June 13, 2004 and September 22, 2003. The records dated September 22, 2003, are difficult to read but appear to reference a respiratory complaint. (CX-5, pp. 15-18). The records dated June 13, 2004, note a complaint of lower back pain since "February" and occasional pain in Claimant's left buttock into his lower left extremity. (CX-5, pp. 11-12). Claimant was advised to maintain good posture and avoid bending. (CX-5, p. 13).

11). Dr. Robison diagnosed Claimant with low back pain, but did not attribute the pain to any particular occurrence or event. He prescribed physical therapy and anti-inflammatory medicine and scheduled a follow-up visit for May 2005. (CX-5, p. 4; CX-7, p. 7).

Dr. Robison testified that Claimant's MRI showed "some abnormalities but none of them would account for his symptomatology." He could not find a specific cause of the low back pain. (CX-7, p. 9). The MRI showed a bulging disc at three levels "that did not appear to be causing any significant nerve root impingement." He testified that the "minimal neuroforminal encroachment" could have caused irritation of Claimant's nerves, but opined that "it usually takes a higher degree than what I saw." (EX-7, pp. 10-11). He agreed the MRI and x-rays showed degenerative changes and that Claimant's complaints could possibly be related to the degenerative changes.[18] (CX-7, pp. 23, 34). He testified that abnormalities on Claimant's MRI and x-rays were "mild" and typical for a 40 year old individual. (CX-7, p. 28).

Dr. Robison felt there was a need for continued treatment of Claimant. (CX-7, pp. 13, 20). He did not give Claimant instructions concerning physical activities or limitations. (CX-7, p. 14). He "did not see anything on any of the imaging diagnostic studies or physical exam" that caused him to think Claimant's return to work would be harmful or dangerous. (CX-7, pp. 14-15). However, Dr. Robison specifically testified that he did not know enough about Claimant or Claimant's employment to recommend that he return to a job that would require heavy lifting or strenuous activity.[19] (CX-7, p. 15).

Dr. Robison noted Claimant had exaggerated responses to certain movements and felt he exhibited Waddell signs. (CX-5, p. 4; CX-7, pp. 15-16). Nonetheless, Dr. Robison felt Claimant's complaints of pain were legitimate and he intended to treat Claimant as if he really had lower back pain.[20] (CX-7, pp. 16-18). Dr. Robison did not believe that testing positive for three Waddell signs was sufficient to diagnose "malingering" and

[18] A radiology report dated January 10, 2005, found "hypertrophic spurring" along the "vertebral bodies at L-2, L-3, and L-4." (CX-5, p. 20).
[19] Dr. Robison could not agree or disagree with Dr. Gallagher's release of Claimant to full duty work because he "did not know enough about [Claimant] or [Claimant's] job." (CX-7, p. 23).
[20] Dr. Robison further stated "I would have treated him anyway, whether or not I felt his complaints were legitimate or not, because that's his complaint." (CX-7, p. 18).

he testified that "[i]t's impossible to use Waddell signs to diagnose malingering." (CX-7, p. 21).

William H. Kinnard, M.D.

On May 20, 2004, Dr. Kinnard, whose credentials are absent from the record, examined Claimant at his counsel's behest. Claimant provided a history of his work injury. Claimant also provided a history of an injury to his lower back and left knee in 1983, but denied ongoing problems with his back since that time. Claimant presented with complaints of lower back pain "with referral in a vague distribution and includes the buttocks and posterior thighs." Physical exam revealed tenderness and "mild limited mobility." Dr. Kinnard did not identify evidence of spasm. (CX-6, p. 9). He reviewed Claimant's MRI and "films." Dr. Kinnard opined Claimant was symptomatic for "a lumbosacral strain with degenerative disc disease" and he felt Claimant received appropriate treatment "up to this point." (CX-6, p. 10).

The Vocational Evidence

Carla Seyler

Ms. Seyler, who was accepted as an expert in the field of vocational rehabilitation counseling, testified at formal hearing and is licensed in Louisiana. (Tr. 106). She met with Claimant on March 11, 2005, and completed a labor market survey between March 11, 2005 and March 21, 2005. (Tr. 108, 113). She reviewed the medical records of Dr. Gallagher, Dr. Kinnard, and Dr. Moss. She also reviewed "initial records" from Chabert Medical Center, the records from LaTerre Physical Therapy, and the depositions of Dr. Gallagher and Claimant.[21] (Tr. 109). Claimant informed Ms. Seyler that he resides in Raceland, Louisiana, and has "some domestic violence offenses," but no felony convictions. (Tr. 110). Ms. Seyler also noted Claimant was charged with battery in 1986. (EX-13, p. 2).

Ms. Seyler indicated Claimant had welding classes in high school and at Louisiana Technical College. She noted Claimant took additional welding classes when he was between jobs, learning heliarc and flux core welding.[22] (EX-13, p. 2). She

[21] Since rendering her report, Ms. Seyler reviewed the records and deposition of Dr. Robison. (Tr. 126).

[22] During his deposition, Claimant testified that he did not receive certification from Louisiana Technical College. (EX-6, pp. 17-18). He also testified that he had on-the-job classes at Fluor Daniels, but did not

also indicated Claimant worked as a welder offshore. His employment history also includes tack welding for Avondale and stick welding for Bollinger Shipyards. Claimant also worked as a welder for the following contracting companies: B&K, Fluor Daniels, Southern Louisiana Contractors, Pala Interstate, United Craft, and Professional Construction. He worked for Employer for one and one-half years prior to his injury. (EX-13, p. 3).

Vocational testing indicated Claimant had a fourth grade reading level and sixth or seventh grade math level. (Tr. 112). His transferable skills were the following: ability to operate various types of equipment, ability to follow scaled drawings, good manual dexterity, ability to work independently, and the capability of reading basic written material and performing basic math. (Tr. 118).

Through her review of Claimant's medical records, Ms. Seyler inferred that Dr. Gallagher released Claimant to full duty work without restrictions in March 2004.[23] She also inferred that Dr. Moss recommended no bending or stopping and lifting of no more than 20 pounds, pending the results of a functional capacity evaluation (FCE). (Tr. 111).

Ms. Seyler identified four welding jobs that were commensurate with Claimant's work history, education, location, and Dr. Gallagher's release to regular duty:

> (1) a welder position with Thomassie Boat Builders in Bourg, Louisiana. The position required lifting of 50 to 75 pounds, climbing, bending, and stooping. It was considered a "full duty" welding position. The position paid $15.50 per hour and required a 44-hour work week. The potential employer hired at least 10 welders in the prior year. (Tr. 114, 137-140; EX-13, p. 5).
>
> (2) a welder position with B & D Contracting in Houma, Louisiana. The employee would have to pass a welding test and would perform "flux core and stick welding tasks." The position required three years of welding experience and an individual with a prior criminal conviction would be considered. Prior vocational training was "beneficial," but not required. The employee could alternately stand and walk. The position required lifting

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receive certification. He further testified that he had no other vocational training. (EX-6, p. 18).

[23] Ms. Seyler identified the work release date of March 26, 2004, through the deposition testimony of Dr. Gallagher. (Tr. 122).

up to 50 pounds and occasional climbing, bending, and stooping. The position paid $17.00 to $20.00 per hour and was available at the time of the labor market survey. (Tr. 114, 141-142; EX-13, p. 5).

(3) a welder position with Masse Contracting in Lockport, Louisiana. The company is a contractor that places welders in shipyards located in Houma, Lockport, and Amelia, Louisiana. The employee would perform flux core welding. The employer required three years of welding experience and a welding test. No educational requirements were identified and an applicant with a prior criminal conviction would be considered. The position required climbing, lifting of 50 pounds, alternated standing and walking, and occasional bending and squatting. The position paid $14.00 to $16.00 an hour. The employer had 50 to 75 openings for welders in the past year and openings available at the time of the labor market survey. (Tr. 114, 143-145; EX-13, p. 5).

(4) a shop welding position with Cameco Industries in Thibodaux, Louisiana. The employee would perform flux core, short arc, and stick welding. An individual with a criminal conviction would be considered. The employer required prior vocational training or work experience. An employee must pass a welding test, a drug screen, and a physical with back x-rays.[24] The employee must be able to read and write and have basic math skills. A high school diploma or GED was not required if the applicant has "a good experience background." The position required occasional bending, squatting, stooping, kneeling, and climbing. The employee would occasionally lift 40 to 50 pounds and would never crawl. The position required good manual dexterity and frequent use of the upper extremities. There was no overhead work. (Tr. 114, 147-148; EX-13, p. 5).

The shop welder positions last six months to three years and pay $10.00 to $12.00 per hour. There were current openings at the time of the labor market survey and the employer hired 10 to 15 welders in the past year. (Tr. 148-150).

[24] Ms. Seyler did not inquire whether a potential applicant with bulging discs would be hired because she based the labor market survey on the premise that Dr. Gallagher released Claimant to full duty work. (Tr. 149-150).

Ms. Seyler performed an additional labor market survey based upon Dr. Moss's opinion of May 2004, specifically that Claimant could not lift more than 20 pounds with no bending or stooping until an FCE was performed. (Tr. 115). Based on the restrictions, she identified the following jobs:

> (1) a machine operator with Weatherford Gemoco in Houma, Louisiana. The company was accepting applications at the time of the labor market survey and has frequent openings.[25] The employer previously hired in approximately May 2004. The employer provided full training for the entry level position. The job required alternated sitting, standing, and walking, as well as "regular frequent" lifting of 25 to 30 pounds and occasional lifting of up to 50 pounds. The employer indicated that an applicant with a 20-pound lifting restriction could be considered. The position paid $7.00 per hour. (Tr. 116, 152-154; EX-13, p. 5).
>
> (2) an assembler position with International Marine Systems in Schriever, Louisiana. The employer provided on-the-job training to assemble and disassemble circuit boards, panel wireups, and electronic control systems. The position was entry level and required familiarity with small hand tools. The employee would sit while carrying out job tasks and could sit or stand as needed. The lifting requirement was less than 15 to 20 pounds.[26] An applicant with a felony conviction would be considered. The employer hires "every few months" and hired in May 2004, July 2004, and September 2004.[27] A high school degree was preferred, but not required. The job paid $6.00 per hour. (Tr. 116, 156-158; EX-13, p. 6).
>
> (3) a consumer products inspector with Walle Corporation in Harahan, Louisiana, approximately 38 miles from Raceland, Louisiana. The employee inspects labels for defects and color variations. The employee would stand while working, lift less than 10 pounds, use his hands repetitively, and work at the waist-level. There was no bending or stooping. The position provided on-the-job

[25] The machine operator position had been filled when the employer was contacted; however, the hired employee's paperwork was still being processed. (Tr. 153).

[26] Ms. Seyler described the position as "generally a sedentary position." (Tr. 157).

[27] Whether the position was available at the time of the labor market survey is unclear from Ms. Seyler's report and testimony.

training and required a high school diploma. An applicant with a conviction would be considered. The position paid $6.00 per hour and was available at the time of the labor market survey. (Tr. 116-117, 159-161; EX-13, p. 6).

(4) an unarmed gate guard with Parc Fontaine Apartments at an apartment complex in Kenner, Louisiana, approximately 36 miles from Raceland, Louisiana. The employee would be stationed at a guard house to monitor entrance into the complex and check guests in and out of the complex. He would occasionally walk to monitor various areas and would contact local authorities in the event of a disturbance or suspicious activity. The position provided on-the-job training. The employee would alternately sit, stand, and walk. He would complete incident reports and could request assistance in completing such reports. (Tr. 116, 163-164; EX-13, p. 6).

Prior security experience was preferred but not required. An applicant with a police record or convictions would be considered depending on the circumstances; "domestic reasons" were specifically "considered okay."[28] There were no educational requirements. The position paid $7.00 to $8.00 per hour and shifts ranged from four to ten hours. The position was open at the time of the labor market survey and was previously open in May and June 2004. (Tr. 117, 163-164; EX-13, p. 6).

(5) a dental lab technician trainee with Trafficano Dental Lab in Marrero, Louisiana, approximately 39 miles from Raceland, Louisiana. The employee would construct and repair dentures or dental appliances and make deliveries. The employee would work at a chest-level counter and could sit on a bar stool while working. The job required frequent lifting of less than 5 pounds. Once every week or two weeks, a 50-pound bag must be moved, but assistance could be requested. On-the-job training was provided and experience was not needed. The position required a high school diploma or GED and paid $5.30 to $6.00 per hour. The position was open in July 2004. Although the employer was accepting applications for future openings, the position was not available at the time of the labor market survey. (Tr. 116-117, 166-168; EX-13, p. 6).

[28] Ms. Seyler did not specifically ask whether the employer would consider an applicant charged with battery. (Tr. 165).

(6) an assembler job with Allfax Specialties in St. Rose, Louisiana. The employee would perform repetitive bench or line assembly tasks to mass-produce products. The employee must be able to use small hand tools and on-the-job training was provided. A high school diploma or GED was preferred, but not required. The position required occasional lifting of 20 pounds and standing for approximately three hours at a time. There was no overhead work. The position paid $7.50 an hour and the position was open at the time of the labor market survey and had been open periodically since May 2004, although the employer did not specify whether it was a full-time or part-time position. (Tr. 116-117, 168-170; EX-13, p. 6).

When Ms. Seyler met with Claimant, he indicated that "he did not feel that he could return to work." (Tr. 119). She did not know whether anyone told Claimant he could return to full duty work. (Tr. 122). If a patient complains of pain with certain physical activities, she would contact his doctor to make sure there was clear communication about the complaints and ensure that the activities recommended by the doctor could not harm the patient. (Tr. 127). She also reviews the records of the doctor to determine if he has considered the patient's complaints of pain. In the instant case, she determined that Dr. Gallagher did consider Claimant's complaints and found an exaggeration of complaints. (Tr. 128).

Subsequent to rendering her report, Ms. Seyler reviewed the reports and deposition of Dr. Robison, who asserted he would treat Claimant's complaints as legitimate. (Tr. 126, 129). She did not feel it was necessary to contact Dr. Robison because he did not find anything on the imaging diagnostic studies or on physical exam that would make Claimant's return to work either harmful or dangerous. (Tr. 129).

Stephanie Schexnayder

Ms. Schexnayder was deposed by the parties on May 19, 2005. (CX-11). She is the office manager of B&D Contracting and is responsible for payroll, invoicing, interviewing and hiring, and workman's compensation. (CX-11, p. 5). In the interviewing/hiring process, Ms. Schexnayder screens applicants and submits their names to customers. (CX-11, p. 6). The applicant must pass a "first class test" and must submit to a physical, which includes a drug screen, an audiogram, a

respiratory fitness test, and a pulmonary questionnaire.[29] (CX-11, pp. 7-8). Ms. Schexnayder did not know whether an applicant with four bulging discs and a degenerative disc disease would be hired. (CX-11, p. 9). However, an applicant under a doctor's care must be released because the customers would not otherwise hire him. The decision to hire is not Ms. Schexnayder's decision. (CX-11, p. 10).

Ms. Schexnayder recalled participating in a labor market survey in which she responded that a person with a fifth-grade education could be hired if he passes a "first-class test." (CX-11, p. 12). A flux core or stick welding applicant with welding experience since the 1980s would be considered for employment, as would an applicant with a physician's release and no work restrictions.[30] (CX-11, p. 18). Her company was hiring welders at the time of her deposition and welders in the area of Morgan City and Amelia, Louisiana, earned $17.00 per hour. She did not know if any positions were available in March 2004. (CX-11, p. 15).

Craig Masse

Mr. Masse, the president/owner of Masse Contracting, was deposed by the parties on May 19, 2005. (CX-12). He is involved in interviewing and hiring, but has two or three "coordinators" who do screening and hiring. (CX-12, p. 6). When hiring an employee, he considers the applicant's "skills" rather than his reading and comprehension skills. (CX-12, p. 7). The application contains a one-page medical history and he questions applicants about past injuries. (CX-12, p. 8). However, he testified that questions regarding an applicant's medical condition are asked after a job is offered. (CX-12, p. 16).

Mr. Masse testified that an applicant with four bulging discs and a degenerative disc disease would not "fit the job," and agreed that being under a doctor's care for a back injury would "more than likely" be a factor because he would probably not be released to go to work. Mr. Masse would require the applicant to have a full release to regular job duties. (CX-12, pp. 9-10). He would consider an applicant with welding

[29] Ms. Schexnayder did not know whether reading and comprehension were involved in a "first-class test," but she testified that it was "hands-on." (CX-11, p. 13).

[30] The applicant would still have to be approved by B&D Contractor's doctor. (CX-11, p. 19).

experience dating to the mid-1980s, with a high school diploma, and a full doctor's release. (CX-12, pp. 14-15).

Masse Contracting was hiring welders at the time of Mr. Masse's deposition and flux core welders were earning $14.00 to $17.00 per hour. There were also job openings in March 2004. (CX-12, pp. 11-12). Masse Contracting has had flux core welding positions available on a daily basis for the past year. (CX-12, p. 15). Mr. Masse recalled participating in a labor market survey, via telephone, approximately one month prior to his deposition. He believed he spoke with Dawn Johnson. (CX-12, p. 13). He also felt there was a "good chance" that someone else with responsibility over hiring could have been contacted regarding job openings for welders. (CX-12, p. 18).

Carol Mueller

Ms. Mueller, the director of human resources for Walle Corporation, was deposed by the parties on May 19, 2005. (CX-13). Ms. Mueller testified that she may have participated in a market survey in March 2005 and specified that she does "a lot of surveys that come through [her] office." She did not recall a specific survey from March 2005. (CX-13, pp. 7-8). Her assistant, Ms. Tauzin, is not authorized to participate in market surveys. (CX-13, p. 8).

The general requirements for an applicant are a GED or equivalent, the skills necessary for the given position, the ability to follow simple directions, and the ability to lift 50 pounds. (CX-13, pp. 8-9). An applicant with a fifth-grade reading level would qualify for employment if he had a GED or equivalent. (CX-13, p. 9). An applicant must undergo a physical with the doctors at Elmwood Industrial. Ms. Mueller testified that an applicant with four bulging discs and a degenerative disc disease would be disqualified from employment with Walle Corporation. (CX-13, pp. 9-10). An applicant with restrictions of no bending or stooping and a 20-pound lifting restriction would not be considered for the inspector position. (CX-13, p. 11). The corporation could not accommodate the lifting restriction by having someone assist the employee and Ms. Mueller was not aware of any positions in "the plant area" that could accommodate such a lifting restriction. (CX-13, p. 12). If an applicant presented a full medical release, he would only be hired if he passed a physical with the corporation's doctor. (CX-13, p. 14).

Walle Corporation did not have any positions available at the time of Ms. Mueller's deposition, but the corporation has hired "with frequency" over the past year. The starting salary for the inspector position is $6.50 per hour. (CX-13, p. 13).

Dianna Coe

Ms. Coe is the human resources manager for Allfax and was deposed by the parties on May 19, 2005. (CX-14, p. 5). She testified that she "could have" participated in a labor market survey conducted by Seyler-Favaloro in March 2005. (CX-14, p. 6). An applicant with a fifth grade reading and comprehension level would not be automatically ineligible for the job of an assembler, but the position requires a high school diploma or its equivalent. (CX-14, p. 7). During the interview process, the manager assesses whether the applicant is able to perform the duties of the job. (CX-14, p. 8). An applicant for an assembler position would not have to fill out a medical questionnaire or undergo a physical examination. (CX-14, pp. 10-11).

An applicant with four bulging discs and a degenerative disc disease would not be automatically disqualified from an assembler position, unless he could not stand for five hours straight. (CX-14, p. 11). An assembler must be able to lift up to 20 pounds and must be able to use small hand tools. (CX-14, p. 13). The position also requires bending and stooping on a repetitive basis. (CX-14, p. 19). Ms. Coe testified that it would be "ill-advised" to consider an applicant who could not bend, stoop, or lift more than 20 pounds. (CX-14, p. 15). She could not state whether accommodations could be made for an individual with such restrictions. (CX-14, p. 16).

At the time of Ms. Coe's deposition, there were no assembler positions available. She could not recall whether any assembler positions were available in March 2004, but testified that such positions have been available approximately every two months since March 2004. (CX-14, pp. 14, 19). The assembler position pays $7.50 per hour. (CX-14, p. 17).

Kimberly Fournier

Ms. Fournier is the senior human resources representative for Weatherford Gemoco and was deposed by the parties on May 19, 2005. (CX-15). She recalled participating in a job market survey approximately one month prior to her deposition, but could not identify the rehabilitation firms with which she has

spoken. (CX-15, pp. 6-7). Her assistants are authorized to furnish information for job market surveys, but cannot provide information regarding the details of certain positions. The more detailed questions are answered by "someone from the department." (CX-15, pp. 7-8).

An applicant with a fifth grade reading and comprehension level would be qualified for a machine operator position. An applicant does not have to fill out a medical questionnaire, but must pass a physical examination after receiving an offer of employment. Ms. Fournier could not state whether an applicant with four bulging discs and a degenerative disc disease would be eligible for a position with Weatherford Gemoco. (CX-15, p. 9). An applicant who was released to full duty by one doctor, but released to modified duty by another doctor, would not be disqualified from applying for a position as a machine operator. An applicant's suitability for employment based on his physical capabilities is determined by the physician who conducts the physical. (CX-15, pp. 10-11). An applicant with restrictions of no bending or stooping and limited lifting of no more than 20 pounds would be considered for the machine operator position because the physical determines whether the applicant can perform the necessary duties. (CX-15, p. 16).

There were open machine operator positions at the time of Ms. Fournier's deposition. (CX-15, p. 13). She testified that machine operator positions have been available on a monthly basis since March 2004. (CX-15, p. 16).

Geraldine Thomasee

Ms. Thomasee is the office supervisor of Thomasee Boatbuilders and was deposed by the parties on May 23, 2005. (CX-16, pp. 6-7). She could not recall participating in a labor market survey, but testified that she "may have" participated in a survey and that her receptionist might take calls for her. (CX-16, p. 10).

When an individual applies for employment, the company sets up an appointment for the applicant to take a test for ABS approval.[31] (CX-16, p. 11). Ms. Thomasee has not been presented with an applicant who has a fifth grade reading and comprehension level, but testified that "the main testing is the welding testing by ABS."[32] (CX-16, p. 13). The application does

[31] ABS stands for American Bureau of Shipping. (CX-16, p. 12).
[32] Ms. Thomasee stated that there is "a grade level on our employee form, but most of the qualifications are actually the work-related." (CX-16, p. 24).

not contain medical questions; a physician handles the physicals and drug screening. (CX-14, p. 12). The applicants do not supply the company with any medical information and the physician decides if the applicant is employable. (CX-16, p. 15). If an applicant was released to work with no restrictions, he would be considered for employment as long as the company physician approved him for employment. (CX-16, p. 23).

The physical requirements are lifting of 100 pounds, climbing, bending, stooping, and crawling. (CX-16, p. 21). A certified welder who has passed the ABS test earns $16.00 or $16.50 per hour. (CX-16, pp. 12-13). The company did not have any welder positions available at the time of Ms. Thomasee's deposition, but she indicated positions could become available at anytime. It is possible that welder positions were available in March 2005. (CX-16, pp. 22, 28).

Jude Trafficano

Mr. Trafficano was deposed by the parties on May 23, 2005. (CX-17). He is a dental laboratory technician and owns a dental lab. (CX-17, p. 6). He was contacted by Ms. Seyler and informed her that he would hire a worker who could not lift 50 pounds. (CX-17, p. 7). Mr. Trafficano has two-part time employees, but his wife and he are the only full-time workers.[33] (CX-17, pp. 7-8). A person with no experience as a dental lab technician would start at a 20-hour per week part-time position, earning $6.25 per hour. (CX-17, p. 9). He has hired two employees in the past three years and both employees were part-time workers. (CX-17, p. 13). He hired a part-time employee approximately three weeks before his deposition. The position was not advertised. (CX-17, p. 16). Mr. Trafficano testified that he has not advertised to hire a dental lab technician trainee in over a year. (CX-17, p. 17).

The position required good eyesight and good hand/eye coordination. A lab technician might be required to stand for three hours, but could take breaks. (CX-17, p. 11). The heaviest lifting is 50 pounds, which Mr. Trafficano lifts himself. (CX-17, p. 11). He would require a work release for an applicant who was still under a physician's care for a back problem. (CX-17, p. 12).

Mr. Trafficano would do on-the-job training with an employee who has a fifth grade reading and comprehension level.

[33] He had one full-time employee around 1996. (CX-17, p. 10).

The job did not require written calculations, but the lab technicians perform measurements. (CX-17, p. 14). He would consider an applicant with a high school diploma or with restrictions of no bending, no stooping, and no lifting of greater than 20 pounds. (CX-17, pp. 17-18).

The Contentions of the Parties

Claimant contends he has not yet reached maximum medical improvement and that he cannot perform full duty work because of the physical restrictions imposed by Dr. Moss. Claimant contends Employer has not demonstrated suitable alternative employment. Claimant further argues that the calculation of his average weekly wage should include per diem payments and contends he is entitled to weekly compensation payments of $460.76. He requests reimbursement of medical expenses and an award for any unpaid medical expenses.

Employer contends Claimant reached maximum medical improvement on March 26, 2004, and was no longer disabled after May 21, 2004. In the Claimant is found totally disabled, Employer contends that it established suitable alternative employment and that Claimant failed to demonstrate diligent effort in attempting to secure alternative employment. Employer argues that Claimant earned an average weekly wage of $369.00 and that calculation of his average weekly wage should not include the untaxed per diem payments. Employer further argues Claimant selected Dr. Gallagher as his choice of physician and failed to request authorization to seek treatment elsewhere.

IV. DISCUSSION

It has been consistently held that the Act must be construed liberally in favor of the Claimant. Voris v. Eikel, 346 U.S. 328, 333 (1953); J. B. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion. Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251 (1994), aff'g. 990 F.2d 730 (3rd Cir. 1993).

In arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the

credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners. Duhagon v. Metropolitan Stevedore Company, 31 BRBS 98, 101 (1997); Avondale Shipyards, Inc. v. Kennel, 914 F.2d 88, 91 (5th Cir. 1988); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 551 F.2d 898, 900 (5th Cir. 1981); Bank v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 929 (1968).

A. The Compensable Injury

Section 2(2) of the Act defines "injury" as "accidental injury or death arising out of or in the course of employment." 33 U.S.C. § 902(2). Section 20(a) of the Act provides a presumption that aids the Claimant in establishing that a harm constitutes a compensable injury under the Act. Section 20(a) of the Act provides in pertinent part:

> In any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary-that the claim comes within the provisions of this Act.

33 U.S.C. § 920(a).

The Benefits Review Board (herein the Board) has explained that a claimant need not affirmatively establish a causal connection between his work and the harm he has suffered, but rather need only show that: (1) he sustained physical harm or pain, and (2) an accident occurred in the course of employment, or conditions existed at work, which **could have caused** the harm or pain. Kelaita v. Triple A Machine Shop, 13 BRBS 326 (1981), aff'd sub nom. Kelaita v. Director, OWCP, 799 F.2d 1308 (9th Cir. 1986); Merrill v. Todd Pacific Shipyards Corp., 25 BRBS 140 (1991); Stevens v. Tacoma Boat Building Co., 23 BRBS 191 (1990). These two elements establish a **prima facie** case of a compensable "injury" supporting a claim for compensation. Id.

1. Claimant's Prima Facie Case

Claimant's **credible** subjective complaints of symptoms and pain can be sufficient to establish the element of physical harm necessary for a **prima facie** case and the invocation of the Section 20(a) presumption. See Sylvester v. Bethlehem Steel

Corp., 14 BRBS 234, 236 (1981), aff'd sub nom. Sylvester v. Director, OWCP, 681 F.2d 359, 14 BRBS 984 (CRT)(5th Cir. 1982).

The parties do not dispute that Claimant was injured on February 10, 2004, during the course and scope of his employment with Employer. However, the medical evidence of record discusses a lumbar strain and degenerative disc disease, namely arthritis and bulging discs at Claimant's L-3, L-4, and L-5 levels. Because it is unclear whether the parties stipulated to the compensability of both conditions, I find it necessary to determine which, if any, of the conditions are compensable as supported by the record.

On February 10, 2004, Claimant treated with Dr. Gallagher, who later opined that a lumbar strain could have resulted from the accident described by Claimant. Dr. Gallagher did not believe that Claimant's arthritis, bulging discs and degenerative disc disease were aggravated by the work injury. Nonetheless, Dr. Moss provided a second opinion and specifically opined that Claimant's lumbar strain "could have aggravated the pre-existing degenerative changes in his lumbar spine." I find and conclude the foregoing opinions are sufficient to establish that Claimant's injuries could have been caused by his work-related accident.

Thus, Claimant has established a **prima facie** case that he suffered an "injury" under the Act, having established that he suffered a harm or pain on February 10, 2004, and that the working conditions and activities on that date could have caused the harm or pain. Accordingly, Claimant has presented sufficient evidence to invoke the Section 20(a) presumption. Cairns v. Matson Terminals, Inc., 21 BRBS 252 (1988).

2. Employer's Rebuttal Evidence

Once Claimant's **prima facie** case is established, a presumption is invoked under Section 20(a) that supplies the causal nexus between the physical harm or pain and the working conditions which could have caused it.

The burden shifts to the employer to rebut the presumption with substantial evidence to the contrary that Claimant's condition was neither caused by his working conditions nor aggravated, accelerated or rendered symptomatic by such conditions. See Conoco, Inc. v. Director, OWCP [Prewitt], 194 F.3d 684, 33 BRBS 187 (CRT)(5th Cir. 1999); Gooden v. Director, OWCP, 135 F.3d 1066, 32 BRBS 59 (CRT)(5th Cir. 1998); Louisiana

Ins. Guar. Ass'n v. Bunol, 211 F.3d 294, 34 BRBS 29(CRT)(5th Cir. 1999); Lennon v. Waterfront Transport, 20 F.3d 658, 28 BRBS 22 (CRT)(5th Cir. 1994). "Substantial evidence" means evidence that reasonable minds might accept as adequate to support a conclusion. Avondale Industries v. Pulliam, 137 F.3d 326, 328 (5th Cir. 1998); Ortco Contractors, Inc. v. Charpentier, 332 F.3d 283 (5th Cir. 2003) (the evidentiary standard necessary to rebut the presumption under Section 20(a) of the Act is "less demanding than the ordinary civil requirement that a party prove a fact by a preponderance of evidence").

Employer must produce facts, not speculation, to overcome the presumption of compensability. Reliance on mere hypothetical probabilities in rejecting a claim is contrary to the presumption created by Section 20(a). See Smith v. Sealand Terminal, 14 BRBS 844 (1982). The testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. See Kier v. Bethlehem Steel Corp., 16 BRBS 128 (1984).

When aggravation of or contribution to a pre-existing condition is alleged, the presumption still applies, and in order to rebut it, Employer must establish that Claimant's work events neither directly caused the injury nor aggravated the pre-existing condition resulting in injury or pain. Rajotte v. General Dynamics Corp., 18 BRBS 85 (1986). A statutory employer is liable for consequences of a work-related injury which aggravates a pre-existing condition. See Bludworth Shipyard, Inc. v. Lira, 700 F.2d 1046 (5th Cir. 1983); Fulks v. Avondale Shipyards, Inc., 637 F.2d 1008, 1012 (5th Cir. 1981). Although a pre-existing condition does not constitute an injury, aggravation of a pre-existing condition does. Volpe v. Northeast Marine Terminals, 671 F.2d 697, 701 (2d Cir. 1982). It has been repeatedly stated employers accept their employees with the frailties which predispose them to bodily hurt. J. B. Vozzolo, Inc. v. Britton, supra, 377 F.2d at 147-148.

If an administrative law judge finds that the Section 20(a) presumption is rebutted, he must weigh all of the evidence and resolve the causation issue based on the record as a whole. Universal Maritime Corp. v. Moore, 126 F.3d 256, 31 BRBS 119(CRT)(4th Cir. 1997); Hughes v. Bethlehem Steel Corp., 17 BRBS 153 (1985); Director, OWCP v. Greenwich Collieries, supra.

After reviewing the medical evidence of record, I find Employer has not rebutted the Section 20(a) presumption with regard to Claimant's lumbar strain. Dr. Gallagher opined that

the strain could have been caused by the accident as described by Claimant. Drs. Kinnard and Moss did not identify a specific cause of the lumbar strain, but neither physician offered an opinion to contradict the presumption of causation. Thus, I find and conclude Claimant's lumbar strain is a compensable work-related injury since Employer presented no evidence to sever the causal connection between the injury and Claimant's employment.

With regard to the "pre-existing" conditions in Claimant's lower back, Dr. Gallagher found the arthritis and mild disc bulges to be degenerative conditions and "most probably" related to Claimant's age. During his deposition, Dr. Gallagher opined that Claimant's pre-existing conditions were not aggravated as a result of trauma. Although he indicated an aggravation "could have happened," Dr. Gallagher noted that Claimant's stenosis, arthritis, and disc bulge were too mild to cause the symptoms reported by Claimant.

I find Dr. Gallagher's opinion sufficient to sever a causal connection between Claimant's employment and any symptomatology resulting from his degenerative disc disease. Based on the foregoing, I find and conclude Employer has rebutted the Section 20(a) presumption with respect to an aggravation of his degenerative disc disease through the testimony of Dr. Gallagher.

3. Conclusion or weighing all the evidence

Prefatorily, it is noted the opinion of a treating physician may be entitled to greater weight than the opinion of a non-treating physician under certain circumstances. Black & Decker Disability Plan v. Nord, 123 S.Ct. 1965, 1970 n. 3 (2003) (in matters under the Act, courts have approved adherence to a rule similar to the Social Security treating physicians rule in which the opinions of treating physicians are accorded special deference) (citing Pietrunti v. Director, OWCP, 119 F.3d 1035 (2d Cir. 1997) (an administrative law judge is bound by the expert opinion of a treating physician as to the existence of a disability "unless contradicted by substantial evidence to the contrary")); Rivera v. Harris, 623 F.2d 378 (5th Cir. 2000) (in a Social Security matter, the opinions of a treating physician were entitled to greater weight than the opinions of non-treating physicians).

After reviewing the record in the instant case, I find and conclude Claimant did not sustain an aggravation of his pre-existing degenerative back conditions.

Dr. Kinnard diagnosed Claimant with a "lumbrosacral strain and degenerative disc disease," offering no opinion as to causation and providing only the history of injury given by Claimant. Similarly, Dr. Robison diagnosed "low back pain" which he did not attribute to a specific cause or event. Rather, he opined Claimant's MRI reflected "mild" degenerative changes which he agreed are typical for a 40-year old individual. Thus, while both Drs. Kinnard and Robison identified degenerative conditions, neither provided an opinion as to whether Claimant's work accident aggravated the degenerative conditions.

Unlike Dr. Kinnard and Dr. Robison, Dr. Moss's opinion establishes a possible causal connection between Claimant's work-related injury and symptomatology due to his degenerative conditions. Nonetheless, I find Dr. Moss's opinion is not well-reasoned because he merely concluded that an aggravation "could have" occurred without providing any basis or explanation as to how he reached such conclusion.

Dr. Gallagher, however, believed Claimant's work injury was limited to a pulled muscle and did not involve an injury to "his disc or his facet joints." Dr. Gallagher opined that the findings of mild arthritis and disc bulges were not unusual for an individual of Claimant's age. He further opined that Claimant's degenerative conditions were not aggravated by trauma due to the work-related injury. He specifically stated that the presence of "severe" degenerative conditions would have led him to believe the work accident aggravated Claimant's symptoms and caused continued symptomatology, but explained that the degenerative conditions were too mild to cause the degree of complaints presented by Claimant.[34]

I find Dr. Gallagher provided a well-reasoned explanation and support for his conclusions. I also find Dr. Gallagher's opinion is entitled to greater weight because he treated Claimant on five occasions while the remaining physicians each saw Claimant only one time. Further, it is noted that Dr. Gallagher is a board-certified orthopedist. Dr. Robison is a fourth year resident and the credentials of Drs. Kinnard and

[34] It is noted that Drs. Robison and Moss also found inconsistencies between their findings and Claimant's subjective complaints.

Moss are not included in the record. Based on the foregoing, I find Dr. Gallagher provided the most persuasive opinion and afford his opinion the greatest probative value.

After reviewing medical evidence and weighing the physicians' opinions in the instant case, I find and conclude Claimant's work-related injury did not cause a compensable aggravation of his degenerative disc disease or arthritis.

B. Nature and Extent of Disability

Having found that Claimant suffers from a compensable lumbar strain, the burden of proving the nature and extent of his disability rests with the Claimant. Trask v. Lockheed Shipbuilding Construction Co., 17 BRBS 56, 59 (1980).

Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). The permanency of any disability is a medical rather than an economic concept.

Disability is defined under the Act as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, for Claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Thus, disability requires a causal connection between a worker's physical injury and his inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss of wage earning capacity.

Permanent disability is a disability that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. Watson v. Gulf Stevedore Corp., 400 F.2d 649, pet. for reh'g denied sub nom. Young & Co. v. Shea, 404 F.2d 1059 (5th Cir. 1968)(per curiam), cert. denied, 394 U.S. 876 (1969); SGS Control Services v. Director, OWCP, 86 F.3d 438, 444 (5th Cir. 1996). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. Trask, supra, at 60. Any disability suffered by Claimant before reaching maximum medical improvement is considered temporary in nature. Berkstresser v. Washington Metropolitan Area Transit Authority, 16 BRBS 231 (1984); SGS Control Services v. Director, OWCP, supra, at 443.

The question of extent of disability is an economic as well as a medical concept. Quick v. Martin, 397 F.2d 644 (D.C. Cir 1968); Eastern S.S. Lines v. Monahan, 110 F.2d 840 (1st Cir. 1940); Rinaldi v. General Dynamics Corporation, 25 BRBS 128, 131 (1991).

To establish a **prima facie** case of total disability, the claimant must show that he is unable to return to his regular or usual employment due to his work-related injury. Elliott v. C & P Telephone Co., 16 BRBS 89 (1984); Harrison v. Todd Pacific Shipyards Corp., 21 BRBS 339 (1988); Louisiana Insurance Guaranty Association v. Abbott, 40 F.3d 122, 125 (5th Cir. 1994).

Claimant's present medical restrictions must be compared with the specific requirements of his usual or former employment to determine whether the claim is for temporary total or permanent total disability. Curit v. Bath Iron Works Corp., 22 BRBS 100 (1988). Once Claimant is capable of performing his usual employment, he suffers no loss of wage earning capacity and is no longer disabled under the Act.

C. Maximum Medical Improvement (MMI)

The traditional method for determining whether an injury is permanent or temporary is the date of maximum medical improvement. See Turney v. Bethlehem Steel Corp., 17 BRBS 232, 235, n. 5 (1985); Trask v. Lockheed Shipbuilding Construction Co., supra; Stevens v. Lockheed Shipbuilding Company, 22 BRBS 155, 157 (1989). The date of maximum medical improvement is a question of fact based upon the medical evidence of record. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 186 (1988); Williams v. General Dynamics Corp., 10 BRBS 915 (1979).

An employee reaches maximum medical improvement when his condition becomes stabilized. Cherry v. Newport News Shipbuilding & Dry Dock Co., 8 BRBS 857 (1978); Thompson v. Quinton Enterprises, Limited, 14 BRBS 395, 401 (1981).

In the present matter, nature and extent of disability and maximum medical improvement will be treated concurrently for purposes of explication.

At his deposition, Dr. Gallagher opined Claimant reached maximum medical improvement on March 26, 2004, and that Claimant's lumbar strain had healed by May 21, 2004. Drs.

Kinnard and Moss did not address maximum medical improvement. It is noted that Dr. Moss rendered a report dated May 27, 2004, in which he recommended a FCE to determine whether further "workup and treatment" was necessary. Although Dr. Moss's report arguably suggests that Claimant has not reached MMI, I afford greater weight to the opinion of Dr. Gallagher for the reasons previously discussed.

Dr. Robison arguably had not placed Claimant at MMI because he prescribed physical therapy and scheduled follow-up treatment. In addition, Dr. Robison testified that he felt Claimant needed continued treatment. While I find Dr. Robison expressed valid opinions, it is noted that Dr. Robison diagnosed Claimant with "low back pain" and was unable to identify the cause of the pain. Dr. Robison identified degenerative conditions through review of Claimant's MRI and x-rays, but he failed to identify the presence of a lumbar strain upon examination of Claimant. Without a diagnosis of a lumbar strain, Dr. Robison's recommendation of continued treatment arguably is necessitated by Claimant's degenerative changes and unrelated to Claimant's work injury. For this reason and the reasons previously discussed, I afford more weight to the opinion of Dr. Gallagher.

Based on the foregoing, I find and conclude Claimant reached maximum medical improvement of his work-related lumbar strain on March 26, 2004.

Dr. Gallagher and Dr. Moss are the only two physicians of record to render opinions regarding Claimant's ability to return to work. Prior to March 26, 2004, Dr. Gallagher felt Claimant could perform light duty work with no lifting of greater than 25 pounds. Although his March 26, 2004 office note simply states "rec work," Dr. Gallagher testified that Claimant could have returned to full duty work without restrictions on March 26, 2004. His office note of May 21, 2004, recommends that Claimant "return to regular duty." However, on May 27, 2004, Dr. Moss recommended Claimant continue working at modified duties until a FCE could be performed to determine the extent of Claimant's limitations. Specifically, Dr. Moss restricted Claimant to no bending or stooping and a 20-pound lifting restriction.

Dr. Robison did not place any limitations on Claimant's activities. Dr. Robison stated that he did not find anything on Claimant's "imaging diagnostic studies" or on physical examination to conclude a return to work would be harmful or dangerous. Nonetheless, he testified that he did not know

enough about Claimant or his job to make a recommendation regarding his return to work.

Dr. Gallagher and Dr. Robison both identified positive Waddell signs of symptom magnification. Drs. Gallagher, Moss, and Robison noted discrepancies or inconsistencies between their objective findings and Claimant's subjective complaints. Additionally, Dr. Gallagher found Claimant resistant to the suggestion of returning to work. Based on the foregoing, I afford little credit to Claimant's testimony regarding his continued pain and his physical inability to return to work.

After considering and weighing the testimony of Dr. Gallagher and Dr. Robison, along with the reports of the three physicians, and considering the inconsistent symptomatology and exaggerated complaints noted by three physicians, I find and conclude Claimant could have returned to full duty work without modification on March 26, 2004, pursuant to the recommendation of Dr. Gallagher. Although Dr. Gallagher's office note of March 26, 2004, does not clearly indicate a release to full duty work, I am persuaded by his deposition testimony that he intended to release Claimant on that date. A finding that Claimant suffered from continuing total disability beyond March 26, 2004, is unsupported by substantial evidence on the record considered as a whole.

Based on the foregoing, I find and conclude Claimant was temporarily totally disabled from February 10, 2004 through March 25, 2004. I further find and conclude Claimant was no longer disabled beginning March 26, 2004 and continuing thereafter.

D. Suitable Alternative Employment

If the claimant is successful in establishing a **prima facie** case of total disability, the burden of proof is shifted to employer to establish suitable alternative employment. New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1038 (5th Cir. 1981). Addressing the issue of job availability, the Fifth Circuit has developed a two-part test by which an employer can meet its burden:

> (1) Considering claimant's age, background, etc., what can the claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do?

(2) Within the category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he reasonably and likely could secure?

Id. at 1042. Turner does not require that employers find specific jobs for a claimant; instead, the employer may simply demonstrate "the availability of general job openings in certain fields in the surrounding community." P & M Crane Co. v. Hayes, 930 F.2d 424, 431 (1991); Avondale Shipyards, Inc. v. Guidry, 967 F.2d 1039 (5th Cir. 1992).

However, the employer must establish **the precise nature and terms** of job opportunities it contends constitute suitable alternative employment in order for the administrative law judge to rationally determine if the claimant is physically and mentally capable of performing the work and that it is realistically available. Piunti v. ITO Corporation of Baltimore, 23 BRBS 367, 370 (1990); Thompson v. Lockheed Shipbuilding & Construction Company, 21 BRBS 94, 97 (1988). The administrative law judge must compare the jobs' requirements identified by the vocational expert with the claimant's physical and mental restrictions based on the medical opinions of record. Villasenor v. Marine Maintenance Industries, Inc., 17 BRBS 99 (1985); See generally Bryant v. Carolina Shipping Co., Inc., 25 BRBS 294 (1992); Fox v. West State, Inc., 31 BRBS 118 (1997). Should the requirements of the jobs be absent, the administrative law judge will be unable to determine if claimant is physically capable of performing the identified jobs. See generally P & M Crane Co., 930 F.2d at 431; Villasenor, supra. Furthermore, a showing of only one job opportunity may suffice under appropriate circumstances, for example, where the job calls for **special skills** which the claimant possesses and there are few qualified workers in the local community. P & M Crane Co., 930 F.2d at 430. Conversely, a showing of one **unskilled** job may not satisfy Employer's burden.

Once the employer demonstrates the existence of suitable alternative employment, as defined by the Turner criteria, the claimant can nonetheless establish total disability by demonstrating that he tried with reasonable diligence to secure such employment and was unsuccessful. Turner, 661 F.2d at 1042-1043; P & M Crane Co., 930 F.2d at 430. Thus, a claimant may be found totally disabled under the Act "when physically capable of performing certain work but otherwise unable to secure that

particular kind of work." Turner, 661 F.2d at 1038, quoting Diamond M. Drilling Co. v. Marshall, 577 F.2d 1003 (5th Cir. 1978).

The Benefits Review Board has announced that a showing of available suitable alternate employment may not be applied retroactively to the date the injured employee reached MMI and that an injured employee's total disability becomes partial on the earliest date that the employer shows suitable alternate employment to be available. Rinaldi v. General Dynamics Corporation, 25 BRBS at 131 (1991).

February 10, 2004 through March 25, 2004

Claimant was injured on February 10, 2004, at which time Dr. Gallagher advised that he avoid lifting of greater than 25 pounds. On February 18, 2004, Claimant returned to Dr. Gallagher and was advised not to return to work. On March 5, 2004, Dr. Gallagher released Claimant to light duty work, which he described as no ladder or scaffold climbing, no working at heights, no repetitive bending or lifting, and no lifting of more than 25 pounds. Based on the foregoing, I find Claimant was totally disabled from February 10, 2004 through March 26, 2004, because he was unable to return to his usual employment, which required physical demands exceeding his restrictions.

Among the jobs identified by Employer as suitable alternative employment, only the position of a machine operator with Weatherford Gemoco has been available frequently since March 2004. The restrictions provided by Ms. Seyler indicate that the position required "regular frequent" lifting of 25 to 30 pounds and occasional lifting of up to 50 pounds. Although I find these job requirements do not comport with any of the restrictions assigned by Dr. Gallagher between February 10, 2004 and March 5, 2004, the human resources representative from Weatherford Gemoco testified that an applicant under a doctor's care or with doctor imposed physical limitations would not automatically be disqualified from the position.

Nonetheless, I find that the job with Weatherford Gemoco is not sufficient to constitute suitable alternative employment. Although Ms. Fournier testified that an applicant with physical limitations would be considered for the job subject to approval by the company's physicians, I am not inclined to conclude that a company physician would disregard the restrictions identified by Claimant's physician. It is noted Ms. Seyler testified that Weatherford Gemoco has been willing to accommodate individuals

with restrictions; however, there is no testimony to support a conclusion that the company would accommodate all of Claimant's specific restrictions.[35]

Further, Ms. Fournier was presented only with the restrictions later assigned by Dr. Moss, i.e., no bending or squatting and no lifting of more than 20 pounds. Because the machine operator position specifically required "regular frequent" lifting and Ms. Fournier was not questioned regarding a restricted "repetitive" lifting, I am not persuaded that the position constitutes suitable alternative employment.

Based on the foregoing, I find and conclude Claimant was temporarily totally disabled from February 10, 2004 through March 25, 2004 and entitled to temporary total disability compensation based on his average weekly wage of $340.89, discussed below.

March 26, 2004 through present and continuing

On March 26, 2004, Dr. Gallagher released Claimant to regular duty work without modification. As previously discussed, I afford greater weight to the opinion of Dr. Gallagher than the opinion of Dr. Moss. Accordingly, I find and conclude that Claimant remained able to perform regular duty work without restrictions after March 26, 2004. However, a discussion of suitable alternative employment is appropriate because I find no evidence of record to indicate Employer offered regular employment to Claimant after his release.

Employer presented welding jobs with Thomasee Boat Builders, B&D Contracting, Masse Contracting, and Cameco Industries. After reviewing the testimony of Ms. Seyler, her vocational report, and the deposition testimony of two potential employers, I find and conclude Employer established suitable alternative employment through three of the four positions. The positions required lifting in the range of 50 to 100 pounds, along with standing, walking, climbing, and bending/squatting/stooping on a regular to occasional basis.

[35] When Ms. Fournier was asked if Weatherford Gemoco would accommodate an applicant with a 20-pound lifting restriction, she replied that "the physician determines . . . whether or not they can perform the duties we need them to do." (CX-15, p. 16). Ms. Seyler testified that an unnamed contact at Weatherford Gemoco indicated that help would be available to an employee with a 20-pound lifting restriction and that her contacts in the past have confirmed that the lifting restriction is available. However, she did not provide any information regarding accommodations for the lifting restriction in conjunction with a bending/stooping restriction. (Tr. 153-154).

Given Dr. Gallagher's awareness that Claimant was employed as a welder at the time of injury and his release of Claimant to "regular duty" work without restrictions, I find and conclude Claimant was physically capable of performing the required physical activities and would be considered for employment by Thomasee Boat Builders, B&D Contracting, and Masse Contracting.[36]

Thomasee Boat Builders and B&D Contracting require an applicant to pass a welding test, which carries more weight than the applicant's reading and comprehension skills. Masse Construction also places greater consideration on the applicant's "skills." Thus, I find the positions with Thomasee Boat Builders, B&D Contracting, and Masse Contracting are suitable alternative employment in light of Claimant's educational background. I further find that Claimant's vocational training and welding history arguably satisfies the prior experience required by Thomasee Boat Builders and Masse Contracting.

Mr. Masse testified that Masse Contracting had job openings in March 2004 and on a daily basis for the past year. Accordingly, I find and conclude the welder job was available on March 26, 2004. Because the welder position with Masse Contracting constitutes suitable alternative employment and was available on March 26, 2004, I find and conclude Employer has demonstrated available suitable alternative employment from the date of Claimant's release to regular duty employment by Dr. Gallagher.

Based on the foregoing, I find and conclude Employer demonstrated suitable alternative employment available on March 26, 2004. The record contains a minimum hourly rate of $14.00 for the position, which would result in an average weekly wage of $560.00 for a forty-hour work week. Consequently, I further

[36] The representatives from Thomasee Boat Builders and Masse Contracting testified that an applicant with a full release by his physician would be considered for employment. Although Thomasee Boat Builders and Masse Contracting would further require approval from the company physician, I find that such requirement does not detract from a finding of suitable alternative employment because Employer does not have to place Claimant in these jobs and only has to establish that Claimant could realistically compete for the available positions.

The position with Cameco Industries required a physical examination with back x-rays. Neither party deposed a representative from Cameco Industries, thus I cannot determine whether Claimant's lumbar back strain would preclude consideration of his application at the outset. Accordingly, I find and conclude Employer did not demonstrate a suitable alternative job through the position with Cameco Industries.

find and conclude Claimant is not entitled to any compensation benefits from March 26, 2004 through present and continuing because Employer has demonstrated suitable alternative employment at a higher average weekly wage than that earned during Claimant's employment with Employer.

Assuming **arguendo**, that Dr. Moss's restrictions should be applied to the instant case, which I have previously rejected, I find Claimant became totally disabled beginning May 27, 2004, because the restrictions precluded his return to usual employment as a welder. However, I also find Employer showed available suitable alternative employment beginning June 30, 2004.

On May 27, 2004, Dr. Moss recommended Claimant perform modified duty with no bending or stooping and a 20-pound lifting restriction, pending completion of a FCE. In a labor market survey dated March 21, 2005, Ms. Seyler identified six available positions that she opined constituted suitable alternative employment based on Claimant's restrictions, location, education, and work history. After reviewing the labor market survey and considering the testimony of Ms. Seyler and the representatives of various potential employers, I find and conclude that two of the six identified jobs constitute suitable alternative employment.

I find the positions with Weatherford Gemoco, Allfax, and Walle Corporation do not constitute suitable alternative employment. Ms. Fournier could not testify to the bending and twisting requirements of the machine operator position with Weatherford Gemoco. The human resources manager for Allfax testified Claimant would not be disqualified from employment due to the disc bulges, but testified that the position required repetitive bending and stooping. She indicated it would be "ill-advised" to hire an individual with Claimant's restrictions because accommodations would have to be made. It is unclear whether accommodations would actually be made for the restrictions. Additionally, the human resources director of Walle Corporation testified that a product inspector must be able to lift 50 pounds and the corporation could not accommodate an individual with restrictions of no bending and stooping and no lifting of more than 20 pounds.

Because the bending and stooping requirements are not identified, I cannot determine whether the position with Weatherford Gemoco complies with Claimant's capabilities. Therefore, I cannot determine if the position constitutes

suitable alternative employment. Similarly, I find and conclude the position with Allfax does not constitute suitable alternative employment because it requires repetitive bending/stooping and the potential employer failed to affirmatively state that accommodation could be made for an applicant with Claimant's physical restrictions. I further find and conclude that Employer has not established suitable alternative employment through the position with Walle Corporation because the corporation cannot accommodate Claimant's physical restrictions.

I also find the dental lab technician trainee job with Trafficano Dental Lab does not constitute suitable alternative employment because it was not actually available to Claimant. Ms. Seyler testified that the position was not available at the time of the labor market survey. Mr. Trafficano testified that he hired two workers within the past three years, both part-time employees. He has not advertised an available job in over a year. Thus, I find the position with Trafficano Dental Lab constitutes only a "theoretical" employment opportunity, as Employer has presented no evidence that a job was actually available. See Turner, supra.

The labor market survey identified a position as an assembler with International Marine Systems and a position as an unarmed gate guard with Parc Fontaine Apartments. The assembler position was "generally sedentary" and required lifting of less than 15 to 20 pounds, which I find complies with the restrictions assigned by Dr. Moss. I also find the gate guard position meets Claimant's restrictions, as it involved lifting of less than 5 to 10 pounds and required only alternated sitting, standing, and walking. Based on the job description provided by Ms. Seyler, I further find Claimant meets the potential employers' education requirement by possessing a high school diploma and find that his charge of "domestic battery" would not preclude consideration of his application. Based on the foregoing, I find and conclude Employer demonstrated the availability of suitable alternative employment.

According to Ms. Seyler's testimony, International Marine Systems hires "every few months" and hired in May, July, and September 2004. Additionally, she testified that the gate guard position with Parc Fontaine Apartments was previously available in May and June 2004. I decline to conclude that suitable alternative employment was established by the availability of jobs during the month of May. The record simply sets forth that the two jobs were filled in "May 2004" without providing a more

specific date as to when they were available. Accordingly, I cannot determine whether either potential employer had job openings as of May 27, 2004, when Dr. Moss placed Claimant on restricted duty.

However, the gate guard position with Parc Fontaine Apartments was available in "June 2004." Employer did not provide a more specific date of availability and, thus, I find and conclude that Employer demonstrated a suitable available job which Claimant reasonably could have obtained by June 30, 2004.

Thus, assuming **arguendo** that Dr. Moss's restrictions should properly be applied, I find and conclude Claimant would be entitled to permanent partial disability benefits from May 27, 2004 through June 29, 2004, based on the difference in his average weekly wage of $340.89 and his weekly wage earning capacity of $280.00.[37]

E. Average Weekly Wage

Section 10 of the Act sets forth three alternative methods for calculating a claimant's average **annual** earnings, 33 U.S.C. § 910 (a)-(c), which are then divided by 52, pursuant to Section 10(d), to arrive at an average **weekly** wage. The computation methods are directed towards establishing a claimant's earning power at the time of injury. SGS Control Services v. Director, OWCP, supra, at 441; Johnson v. Newport News Shipbuilding & Dry Dock Co., 25 BRBS 340 (1992); Lobus v. I.T.O. Corp., 24 BRBS 137 (1990); Barber v. Tri-State Terminals, Inc., 3 BRBS 244 (1976), aff'd sum nom. Tri-State Terminals, Inc. v. Jesse, 596 F.2d 752, 10 BRBS 700 (7th Cir. 1979).

Section 10(a) provides that when the employee has worked in the same employment for substantially the whole of the year immediately preceding the injury, his annual earnings are computed using his actual **daily** wage. 33 U.S.C. § 910(a). Section 10(b) provides that if the employee has not worked substantially the whole of the preceding year, his average annual earnings are based on the average daily wage of any employee in the same class who has worked substantially the whole of the year. 33 U.S.C. § 910(b). But, if neither of these two methods "can reasonably and fairly be applied" to determine an employee's average annual earnings, then resort to Section 10(c) is appropriate. Empire United Stevedore v. Gatlin, 935 F.2d 819, 821, 25 BRBS 26 (CRT) (5th Cir. 1991).

[37] ($7.00 per hour x 40 hours = $280.00).

Subsections 10(a) and 10(b) both require a determination of an average daily wage to be multiplied by 300 days for a 6-day worker and by 260 days for a 5-day worker in order to determine average annual earnings.

Section 10(c) of the Act provides:

> If either [subsection 10(a) or 10(b)] cannot reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee and the employment in which [he] was working at the time of his injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

33 U.S.C § 910(c).

The Administrative Law Judge has broad discretion in determining annual earning capacity under subsection 10(c). Hayes v. P & M Crane Co., supra; Hicks v. Pacific Marine & Supply Co., Ltd., 14 BRBS 549 (1981). It should also be stressed that the objective of subsection 10(c) is to reach a fair and reasonable approximation of a claimant's wage-earning capacity at the time of injury. Barber v. Tri-State Terminals, Inc., supra. Section 10(c) is used where a claimant's employment is seasonal, part-time, intermittent or discontinuous. Empire United Stevedores v. Gatlin, supra, at 822.

In the instant case, Claimant worked for Employer for the whole of the year immediately preceding his injury, but neither party submitted Claimant's daily wage records. Claimant testified that he worked five days a week and "a lot" of Saturdays. Without more specific information, I cannot determine the number of days actually worked and, thus, cannot accurately determine Claimant's average daily wage. I conclude that Sections 10(a) and 10(b) of the Act cannot be applied and Section 10(c) is the appropriate standard under which to calculate average weekly wage in this matter.

Claimant contends he earned an average weekly wage of $687.70. He argues his earnings should include his $10.00

"hourly" per diem because he was never required to travel or incur extraordinary food or lodging expenses. Claimant further contends the per diem should be included in his earnings because it was paid for every hour worked and to the same extent as the admitted hourly portion of his wage; thus, despite the designation of a per diem, Claimant was compensated based only on the number of hours he worked. Employer contends the per diem should not be included in Claimant's average weekly wage because the per diem payments were not taxable, relying on H.B. Zachary Co. v. Quinones, 206 F.3d 474 (5th Cir. 2000). Thus, Employer contends Claimant earned an average weekly wage of $369.00.

Claimant relies on Custom Ship Interiors v. Roberts, 300 F.3d 510 (4th Cir. 2002), which held that weekly per diem payments were "wages" under the Act. In Custom Ship Interiors, the claimant received a weekly non-taxable per diem intended to compensate for meal and lodging expenses while completing jobs away from home. The claimant received the unrestricted per diem payments while incurring no room and board expenses. The Fourth Circuit affirmed the Board's holding and included the per diem in the average weekly wage calculation.

It is noted that the Board found Fourth Circuit law controlling in Custom Ship Interiors and the affirmation of the Board decision was likewise decided under Fourth Circuit law. Thus, while I find Custom Ship Interiors to be persuasive, I do not find it controlling in the instant case.

Section 2(13) of the Act states:

> The term "wages" means the money rate at which the service rendered by an employee is compensated by an employer under the contract of hiring in force at the time of injury, including the reasonable value of any advantage which is received from the employer and included for the purposes of any withholding of tax under subtitle C of the Internal Revenue Code of 1954 (relating to employment taxes). The term wages does not include fringe benefits, including (but not limited to) employer payments for or contributions to a retirement, pension, health and welfare, life insurance, training, social security or other employee or dependent benefit plan for the employee's or dependent's benefit, or any other employee's dependent entitlement

The text of the Act requires that a wage be compensation for "service," rather than a reimbursement for expenses. Mr.

Smith testified that the per diem was intended to defray employees' expenses such as lodging and travel expenses. The per diem was paid to all employees, regardless of whether expenses are actually incurred. Accordingly, I find and conclude it was not compensation for "services" as required under the Act and find the per diem similar to an "advantage." See McNutt v. Benefits Review Board, 104 F.3d 1247 (9th Cir. 1998)(Daily per diem of $100.00 to pay for food and lodging was an "advantage" under Section 2(13) of the Act).

In Quinones, supra, the Fifth Circuit held that Section 2(13) of the Act clearly provides that "'wages' equals monetary compensation plus taxable advantages." Both Claimant and Mr. Smith testified that the hourly per diem was not taxed and Claimant's wage records and paycheck stubs support such testimony. Accordingly, because the per diem in the instant case was not subject to taxation, I find and conclude it should not be included in the calculation of Claimant's average weekly wage.

Having found that the non-taxed per diem payments are not wages and should not be included in the calculation of average weekly wage, I find and conclude Claimant earned a total of $17,726.10 from February 10, 2003 through February 10, 2004.[38]

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[38] The paycheck stub dated February 13, 2003, reflects compensation for the pay period ending on February 9, 2003. (CX-8, p. 12). Accordingly, this compensation is not included in the calculation of Claimant's average weekly wage because it was earned prior to the 52 weeks preceding his injury.

The paycheck stub dated February 12, 2004, reflects compensation for the pay period ending on February 8, 2004. (CX-8, p. 45). Because the payroll records identify weekly paychecks to Claimant, I find the payment of $138.60 on February 19, 2004, arguably reflects Claimant's earnings on February 9, 2004 and February 10, 2004. Accordingly, the February 19, 2004 paycheck is included in the computation of Claimant's average weekly wage.

The paycheck stub dated February 26, 2004, contains a handwritten note stating "4.6 hrs. for 2/0 [sic] to make 8 hrs. for day you were hurt." (CX-8, p. 46). I decline to include earnings for the additional 4.6 hours because I cannot determine whether it compensates Claimant for time he actually worked. A "Notice of Final Payment or Suspension of Compensation Payments" filed by Employer indicates that Claimant "first lost pay because of injury" on February 18, 2004. (EX-1, p. 5). In the absence of daily wage reports, I find Employer's contention that Claimant first lost wages on February 18, 2004, is not supported by the record.

Additionally, Claimant submitted several check stubs which he contended were not included in the payroll records produced by Employer. A review of the check stubs and payroll records from February 20, 2003 through February 19, 2004 reveals that two checks in the amounts of $360.00 and $281.40 were omitted from Employer's list. However, further review of Employer's payroll records reveals that these checks were still included in the report totals. Accordingly, the undersigned included both checks in the calculation of average weekly wage.

Accordingly, I find and conclude Claimant earned an average weekly wage of $340.89. ($17,726.10 ÷ 52 = $340.89).

F. Entitlement to Medical Care and Benefits

Section 7(a) of the Act provides that:

> The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.

33 U.S.C. § 907(a).

The Employer is liable for all medical expenses which are the natural and unavoidable result of the work injury. For medical expenses to be assessed against the Employer, the expense must be both reasonable and necessary. Pernell v. Capitol Hill Masonry, 11 BRBS 532, 539 (1979). Medical care must also be appropriate for the injury. 20 C.F.R. § 702.402.

A claimant has established a **prima facie** case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255, 257-258 (1984).

Section 7 does not require that an injury be economically disabling for claimant to be entitled to medical benefits, but only that the injury be work-related and the medical treatment be appropriate for the injury. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 187.

Entitlement to medical benefits is never time-barred where a disability is related to a compensable injury. Weber v. Seattle Crescent Container Corp., 19 BRBS 146 (1980); Wendler v. American National Red Cross, 23 BRBS 408, 414 (1990).

An employer is not liable for past medical expenses unless the claimant first requested authorization prior to obtaining medical treatment, except in the cases of emergency, neglect or refusal. Schoen v. U.S. Chamber of Commerce, 30 BRBS 103 (1997); Maryland Shipbuilding & Drydock Co. v. Jenkins, 594 F.2d 404, 10 BRBS 1 (4th Cir. 1979), rev'g 6 BRBS 550 (1977). Once an employer has refused treatment or neglected to act on claimant's request for a physician, the claimant is no longer obligated to

seek authorization from employer and need only establish that the treatment subsequently procured on his own initiative was necessary for treatment of the injury. Pirozzi v. Todd Shipyards Corp., 21 BRBS 294 (1988); Rieche v. Tracor Marine, 16 BRBS 272, 275 (1984).

The employer's refusal need not be unreasonable for the employee to be released from the obligation of seeking his employer's authorization of medical treatment. See generally 33 U.S.C. § 907 (d)(1)(A). Refusal to authorize treatment or neglecting to provide treatment can only take place after there is an opportunity to provide care, such as after the claimant requests such care. Mattox v. Sun Shipbuilding & Dry Dock Co., 15 BRBS 162 (1982). Furthermore, the mere knowledge of a claimant's injury does not establish neglect or refusal if the claimant never requested care. Id.

Employer contends Claimant selected Dr. Gallagher as his choice of physician and any treatment sought elsewhere is unauthorized. Claimant did not directly address Employer's contentions in his post-hearing brief, but indicated that he was "forced" to seek medical attention at Leonard J. Chaubert Medical Center because Employer terminated his benefits. Additionally, Claimant testified that Employer sent him to Dr. Gallagher and he believed he could see the doctor of his choice after signing the Free Choice of Physician Form. Claimant indicated he would have preferred to have seen a physician recommended by his attorney.

Section 7(b) of the Act permits an injured employee to choose an attending physician to provide medical care; however, if due to the nature of the injury, the employee is not able to make a selection and is in need of immediate medical treatment, the employer may select a physician. Section 7(b) and its implementing regulation, 20 C.F.R. §702.405, contemplate severe injuries, such as unconsciousness or other incapacity, preventing the claimant from selecting a physician. See Hunt v. Newport News Shipbuilding & Dry Dock Co., 28 BRBS 364 (1994); Bulone v. Universal Terminal & Stevedoring Corp., 8 BRBS 515, 517 (1978), overruled on other grounds; Shahady v. Atlas Tile & Marble Co, 13 BRBS 1007 (1981), rev'd on other grounds, 682 F.2d 968 (D.C. Cir. 1982), cert. denied, 459 U.S. 1146 (1983).

In the instant case, Claimant was neither unconscious nor otherwise incapable of choosing his physician at the time of injury. He selected Dr. Gallagher as his choice of physician in order to receive immediate treatment and he continued treating

with Dr. Gallagher over the course of approximately three months. The record contains no evidence that Claimant sought to change his choice of physician during that time. Accordingly, I find and conclude Claimant accepted Dr. Gallagher as his choice of physician by signing the "Free Choice of Physician" form and continuing treatment with Dr. Gallagher.

Once a claimant has made his initial, free choice of a physician, he may change physicians only upon obtaining prior written approval of the employer, carrier, or deputy commissioner. See 33 U.S.C. §907(c)(2); 20 C.F.R. §702.406.

Having found Claimant chose Dr. Gallagher as his initial, free choice of physician, I find no evidence of record indicating that Claimant requested Employer's authorization to seek treatment with Dr. Kinnard or at Leonard J. Chaubert Medical Center. I further find no evidence of record indicating that Employer approved such treatment. Because Dr. Gallagher was Claimant's first choice of physician, I find and conclude authorization from Employer was required for Claimant to seek treatment from Dr. Kinnard and Leonard J. Chaubert Medical Center.

Further, assuming **arguendo** that Dr. Gallagher was not Claimant's initial choice of physician, Claimant was still required to seek Employer's authorization for medical services, including his initial choice. See Ezell v. Direct Labor, Inc., 33 BRBS 19 (1999), citing Maguire v. Todd Shipyards Corp., 25 BRBS 299 (1992); Shahady, supra. Thus, Claimant nevertheless would have been required to obtain authorization from Employer to seek treatment from Dr. Kinnard or Leonard J. Chaubert Medical Center. Again, I find the record contains no evidence of such request. Accordingly, I find and conclude Claimant is not entitled to reimbursement of medical expenses relating to his treatment with either Dr. Kinnard or at Leonard J. Chaubert Medical Center.

Having found that Claimant chose Dr. Gallagher as his choice of physician, I further find and conclude Claimant is entitled to continuing reasonable and necessary medical treatment, as needed, from Dr. Gallagher for his work-related lumbar strain.

V. SECTION 14(e) PENALTY

Section 14(e) of the Act provides that if an employer fails to pay compensation voluntarily within 14 days after it becomes

due, or within 14 days after unilaterally suspending compensation as set forth in Section 14(b), the Employer shall be liable for an additional 10% penalty of the unpaid installments. Penalties attach unless the Employer files a timely notice of controversion as provided in Section 14(d).

In the present matter, I find Employer was notified of Claimant's injury on February 10, 2004. Employer began temporary total disability payments on February 18, 2004. Employer terminated total disability payments on May 21, 2004, and filed its first Notice of Controversion on June 7, 2004. Employer filed a second Notice of Controversion on July 27, 2004.

In accordance with Section 14(b), Claimant was owed compensation on the fourteenth day after Employer was notified of his injury or compensation was due. Thus, Employer was liable for Claimant's total disability compensation payment on February 24, 2004. Employer commenced payment of compensation on February 18, 2004 and paid through May 21, 2004, when Claimant was released to regular duty work without restrictions by Dr. Gallagher. Because Employer controverted Claimant's right to compensation, Employer had an additional fourteen days within which to file with the District Director a notice of controversion. Frisco v. Perini Corp. Marine Div., 14 BRBS 798, 801, n. 3 (1981). Consequently, I find and conclude that Employer is not liable for Section 14(e) penalties, since it timely paid compensation and timely filed a notice of controverstion upon termination of compensation on May 21, 2005.

VI. INTEREST

Although not specifically authorized in the Act, it has been an accepted practice that interest is assessed on all past due compensation payments. Avallone v. Todd Shipyards Corp., 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. Watkins v. Newport News Shipbuilding & Dry Dock Co., aff'd in pertinent part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed percentage rate no longer appropriate to further the purpose of making Claimant whole, and held that ". . . the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). Grant v. Portland Stevedoring Company, et

al., 16 BRBS 267 (1984). Effective February 27, 2001, this interest rate is based on a weekly average one-year constant maturity Treasury yield for the calendar week preceding the date of service of this Decision and Order by the District Director. This order incorporates by reference this statute and provides for its specific administrative application by the District Director.

VII. ATTORNEY'S FEES

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision by the District Director to submit an application for attorney's fees.[39] A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

VIII. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following Order:

1. Employer/Carrier shall pay Claimant compensation for temporary total disability from February 10, 2004 to March 25, 2004, based on Claimant's average weekly wage of $340.89, in accordance with the provisions of Section 8(b) of the Act. 33 U.S.C. § 908(b).

2. Employer/Carrier shall pay all reasonable, appropriate and necessary medical expenses arising from Claimant's February 10, 2004, work injury, pursuant to the provisions of Section 7 of the Act.

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[39] Counsel for Claimant should be aware that an attorney's fee award approved by an administrative law judge compensates only the hours of work expended between the close of the informal conference proceedings and the issuance of the administrative law judge's Decision and Order. Revoir v. General Dynamics Corp., 12 BRBS 524 (1980). The Board has determined that the letter of referral of the case from the District Director to the Office of the Administrative Law Judges provides the clearest indication of the date when informal proceedings terminate. Miller v. Prolerized New England Co., 14 BRBS 811, 813 (1981), aff'd, 691 F.2d 45 (1st Cir. 1982). Thus, Counsel for Claimant is entitled to a fee award for services rendered after **September 21, 2004**, the date this matter was referred from the District Director.

3. Employer/Carrier shall receive credit for all compensation heretofore paid, as and when paid.

4. Employer/Carrier shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961 (1982); Grant v. Portland Stevedoring Co., et al., 16 BRBS 267 (1984).

5. Claimant's attorney shall have thirty (30) days from the date of service of this decision by the District Director to file a fully supported fee application with the Office of Administrative Law Judges; a copy must be served on Claimant and opposing counsel who shall then have twenty (20) days to file any objections thereto.

ORDERED this 19th day of October, 2005, at Covington, Louisiana.

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LEE J. ROMERO, JR.
Administrative Law Judge